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Civil Rights Law—An Application of the Dynamic Approach to Statutory Interpretation—Patterson v. McLean Credit Union, 491 U.S. 164 (1989)

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Civil Rights Law— AN APPLICATION OF THE DYNAMIC APPROACH TO STATUTORY INTERPRETATION—*Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)

INTRODUCTION

President Bush's veto of the Kennedy-Hawkins Civil Rights Bill[1] dashed the hopes many Americans had for a rebuilding of civil rights legislation, legislation that had been systematically undermined by recent Supreme Court cases.[2] This dismantling of civil rights legisla-

1. *See* S. 2104, 101st Cong., 2d Sess., 136 CONG. REC. S9966-68 (daily ed. July 18, 1990). *See also* 136 CONG. REC. S16,457-58 (daily ed. Oct. 22, 1990) (veto message of President Bush). The Civil Rights Bill of 1990 was drafted in part to overrule *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (holding that 42 U.S.C. § 1981 (1988) protection as to contracts does not extend to postformation incidents of racial harassment). Specifically, section 12 of the bill addressed the issue of post-contract racial discrimination. Section 12 would have amended 42 U.S.C. § 1981 by modifying the right to "make and enforce contracts" to include the "making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." S. 2104, 101st Cong., 2d Sess. § 12, 136 CONG. REC. at S9968 (daily ed. July 18, 1990).

The state of Minnesota has taken steps to provide the protections which the Patterson decision and the veto of the Civil Rights Bill of 1990 have denied. *See* MINN. STAT. § 363.03, subd. 8a(c) (1990). On May 3, 1990, Governor Rudy Perpich signed a human rights bill which specifically reversed the effects of *Patterson* by making it an unfair practice to "intentionally . . . discriminate in the basic terms, conditions, or performance of [a] contract because of a person's race, color, sex, or disability . . . ." *Id.*

2. *See* 136 CONG. REC. E3567 (daily ed. Oct. 26, 1990) (statement of Rep. Stokes). Immediately after President Bush's veto, Rep. Hawkins, co-author of the

tion is evident from a line of Supreme Court cases going back to 1989. These cases show the Court's willingness to curtail the expansive interpretation civil rights statutes once enjoyed.[3]

The Court's dismantling of civil rights legislation began with *Wards Cove Packing Co. v. Atonio*.[4] In *Wards Cove*, a class action suit was brought by members of several ethnic minority groups. The plaintiffs alleged that the hiring practices of two Alaskan salmon canneries, and the disparate adverse impact wrought by those hiring practices, violated Title VII.[5] The Court held that a prima facie showing of disparate impact[6] could not be made by merely establish-

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Civil Rights Bill of 1990, reportedly issued a statement accusing President Bush of leading " 'a national retreat from civil rights. . . . By relying on the same shopworn excuses and code words that were offered against every great piece of civil rights legislation, George Bush plays on the worst of America's fears, and the worst of America's prejudices.' " *Id.* (quoting Trescott, *The Long Haul of Rep. Gus Hawkins—At 83, the Steady Champion of Civil Rights is Retiring From a Battle That Won't End*, Washington Post, Oct. 24, 1990).

3. *See generally* Address by William B. Allen, Chairman, U.S. Commission on Human Rights, Heritage Foundation Lecture (Aug. 24, 1989) (NEXIS, News Makers & Policy Makers section). Allen noted:

> "[W]hile each of the recent Supreme Court decisions turned on what the administration has called 'technical legal issues,' the problem arises from the fact that, taken all together, these decisions show a systematic tilt against civil rights claims." Apparently, therefore, we witness a building consensus that, while the Supreme Court has applied the law aptly, which is to say even-handedly, an even-handed application of the law is insufficient.

Id.

4. 490 U.S. 642 (1989).

5. *Id.* at 647. The claim was based on 42 U.S.C. § 2000e-2(a) (1988), which provides:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. The canneries had a practice of hiring mostly nonwhites, especially Filipinos and Alaskan natives, for unskilled "cannery" positions. Skilled "noncannery" positions, such as machinists, however, were filled, for the most part, with white applicants. *See Wards Cove*, 490 U.S. at 647 & n.3. Furthermore, the noncannery positions paid more than the unskilled cannery positions, and the noncannery employees were provided with sleeping and eating arrangements separate from the cannery employees. *Id.*

6. The Supreme Court has interpreted Title VII (42 U.S.C. § 2000e-2(a) (1988)) to proscribe "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Under the disparate impact doctrine, "a facially neutral employment practice may be deemed violative of Title VII without evidence of the employer's objective intent to discriminate . . . ." *Wards Cove*, 490 U.S. at 646.

ing statistical imbalances in the racial composition of certain jobs.[7] The majority sought to further the legislative intent of Title VII to create a color blind society.[8] The majority fell short of this goal. The Court's virtual destruction of the disparate impact doctrine will effectively prevent minorities from using the federal courts to help in overcoming racial barriers to fair and equal employment. In his dissent, Justice Blackmun noted: "One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was."[9]

In *Martin v. Wilks*,[10] white firefighters employed by the city of Birmingham, Alabama, challenged certain affirmative action consent decrees. The white employees asserted that favorable treatment in hiring and promotions for African-American firefighters "constituted impermissible racial discrimination in violation of the Constitution and federal statute."[11] Following a trial, the district court granted a motion to dismiss the white firefighters' claims "as impermissible collateral attacks on the consent decrees."[12] The circuit court, however, reversed, stating that because the white firefighters, suing in their individual capacities, " 'were neither parties nor privies to the consent decrees, . . . their independent claims of unlawful discrimination [were] not precluded.' "[13] The Supreme Court, upholding the circuit court, ruled that parties not joined in a consent decree could collaterally attack the decree's affirmative action plan.[14] In doing so, the Court substituted rules which unfairly burden minorities by subjecting judicially approved affirmative action plans to reconsideration for procedural rules unique to Title VII cases.[15] In his dissent, Justice Stevens stated that, "[j]ust as white employees in the past were innocent beneficiaries of illegal discriminatory practices, so is it inevitable that some of the same white employees will be innocent victims who must share some of the burdens resulting from

7. *Wards Cove*, 490 U.S. at 653-54.

8. *See The Supreme Court, 1988—Leading Cases*, 103 HARV. L. REV. 137, 359 (1989) (The legislative history of Title VII indicates that the aim of the legislation was equal treatment of all individuals, regardless of race.) [hereinafter *Leading Cases*].

9. *Wards Cove*, 490 U.S. at 679 (Blackmun, J., dissenting).

10. 490 U.S. 755 (1989), *reh'g denied*, 492 U.S. 932 (1989).

11. *Id.* at 758. The consent decrees were the result of litigation commenced by the NAACP and individual plaintiffs in 1974. *Id.* at 759. The decrees "set forth an extensive remedial scheme, including long-term and interim annual goals for the hiring of blacks as firefighters. The decrees also provided for goals for promotion of blacks within the department." *Id.*.

12. *Id.* at 760.

13. *Id.* at 761 (quoting Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492, 1498 ((11th Cir. 1987)).

14. *Martin*, 490 U.S. at 761-62; *see also Leading Cases*, *supra* note 8, at 310-20.

15. *See Leading Cases*, *supra* note 8, at 311.

the redress of the past wrongs."[16]

The Supreme Court completed the dismantling of civil rights legislation in *Patterson v. McLean Credit Union*.[17] In *Patterson*, the Court considered whether the victim of racial harrassment at the hands of a private employer could sue that employer under that portion of 42 U.S.C. § 1981 protecting the right to make and enforce contracts.[18] The Court reconsidered *Runyon v. McCrary*,[19] a 1976 case, where the Court had held that 42 U.S.C. § 1981 applied to private acts of discrimination.[20] Although the Court ultimately upheld *Runyon*,[21] the narrow and stilted interpretation of section 1981 set forth in *Patterson* contradicts the much broader interpretation given that statute in *Runyon*.[22]

The Court ignored the legislative history of section 1981,[23] and

16. *Martin*, 490 U.S. at 792 (Stevens, J., dissenting).

17. 491 U.S. 164 (1989).

18. *Patterson*, 491 U.S. at 170-71; *see also* 42 U.S.C. § 1981 (1988).

19. Runyon v. McCrary, 427 U.S. 160 (1976).

20. *See Patterson*, 491 U.S. at 171-73 (referring to *Runyon*, 427 U.S. at 160). *Runyon* involved a class action suit brought on behalf of several African-American children by the children's parents. The plaintiffs challenged as violative of 42 U.S.C. § 1981 the racially discriminatory admission practices of several private schools. *See Runyon*, 427 U.S. at 163-64. In ruling that section 1981 did indeed bar acts of private discrimination, the Court stated that "[i]t is now well established that [section 1981] prohibits racial discrimination in the making and enforcement of private contracts." *Id.* at 168 (citation omitted). The Court, in reviewing prior decisions regarding section 1981, interpreted the protections of section 1981 as broad and sweeping. The Court reiterated that section 1981 "unequivocally' . . . 'affords a federal remedy against discrimination in private employment on the basis of race.' " *Id.* at 172 (quoting Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975)).

21. The Court refused to overrule *Runyon*, stating:

> [N]o special justification has been shown for overruling *Runyon*. In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress.

Id. at 173.

22. The majority held that the right to make contracts, found in section 1981, applied exclusively to precontractual conduct. *Id.* at 175-77. Specifically, the Court stated:

> [T]he right to make contracts does not extend as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII.

Id. at 177.

23. Advocates of textualism assert that the Court should interpret only the literal meaning of a statute rather than the statute's legislative past. *See* Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 23 (1988) [hereinafter Aleinikoff]. In defense of this approach, Justice Jackson argued:

instead applied a literal and overly narrow "plain meaning"[24] interpretation to "the same right . . . to make and enforce contracts."[25] This interpretation is inconsistent with the prevailing interpretation of the statute's legislative purpose[26] and in sharp contrast to the expansive interpretation afforded civil rights legislation in recent decades.[27]

This Comment first examines the legislative history of section 1981's predecessor—the Civil Rights Act of 1866. Second, three approaches to statutory interpretation are discussed: the "intentionalist" approach;[28] the "textualist" approach;[29] and, the "dynamic"

> Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. . . . The Rules of the House and Senate, with the sanction of the Constitution, require three readings of an Act in each House before final enactment. That is intended, I take it, to make sure that each House knows what it is passing and passes what it wants, and that what is enacted was formally reduced to writing. . . . Moreover, it is only the words of the bill that have presidential approval, where that approval is given. It is not to be supposed that, in signing a bill, the President endorses the whole Congressional Record. . . .
>
> Moreover, there are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. Laws are intended for all of our people to live by; and the people go to law offices to learn what their rights under those laws are. Here is a controversy which affects every little merchant in many States. Aside from a few offices in the larger cities, the materials of legislative history are not available to the lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history. Moreover, if he could, he would not know any way of anticipating what would impress enough members of the Court to be controlling.

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-96 (1951). *See also* S. MERMIN, LAW AND THE LEGAL SYSTEM 250 (2d ed. 1982) [hereinafter S. MERMIN].

24. The majority opinion made little reference to the legislative history of the Civil Rights Act of 1866, relying instead on the literal meaning of section 1981. *See, e.g., Patterson*, 491 U.S. at 175-76.

25. Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1988).

26. *See Patterson*, 491 U.S. at 205-12 (Brennan, J., dissenting).

27. *See generally* Johnson v. Transportation Agency, 480 U.S. 616 (1987) (holding that Title VII allowed the Agency to promote women over men with greater seniority to jobs significantly underrepresented by women); United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979) (holding that an affirmative action plan which gave priority in promotions to African-Americans did not violate Title VII); Runyon v. McCrary, 427 U.S. 160 (1976) (holding that section 1981 was applicable to private acts of discrimination).

28. Advocates of intentionalism contend:

> It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning

approach.[30] Third, an analysis of section 1981 cases leading up to *Patterson* is presented, applying the three approaches to statutory interpretation previously mentioned. This analysis demonstrates the Court's movement away from previous textual or literal interpretations of section 1981 to an "intentionalist" approach. The analysis illustrates how, as new circumstances arise which reveal ambiguities within section 1981's legislative past, the Court has begun to interpret section 1981 with reference to current societal, political and legal beliefs consistent with the statute's legislative history—a characteristically dynamic approach. Finally, this Comment proposes a model for applying the three theories of statutory interpretation and concludes that a dynamic approach to *Patterson* renders the most rational result.

I. History of the Civil Rights Act of 1866

The origins of section 1981 date back to the post-Civil War Reconstruction Congress.[31] President Lincoln's Emancipation Proclamation set in motion Congressional action to free African-Americans.[32] Slavery, which Congress once intended to make permanent by a constitutional amendment,[33] was now considered a "moral impossibil-

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> of the words. Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant. The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction.

United States v. Dickerson, 310 U.S. 554, 562 (1940) (citation omitted).

29. *See supra* note 23.

30. *See infra* note 65.

31. The prevailing view is that 42 U.S.C. § 1981 is a recodification of the Civil Rights Act of 1866 . This view holds that the Enforcement Act of 1870 and its codification in 1874 had no effect on the original Civil Rights Act. *See* Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 439 (1973); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441-43, 443 n.78 (1968). The contrary view is that the Civil Rights Act was repealed and section 16 of the 1870 Enforcement Act was recodified as section 1981. The basis for this argument is a note appended to the revised statutes which does not mention the Civil Rights Act as the statute which was updated by section 1981. *See* Runyon v. McCrary, 427 U.S. 160, 207 (1976) (White, J., dissenting).

32. 6 J. Richardson, A Compilation of the Messages and Papers of the Presidents 157-59 (1898) [hereinafter J. Richardson]. President Lincoln proclaimed all slaves to be "forever free." To initiate the emancipation of slaves, Lincoln recommended that Congress grant aid to those states which implement the "immediate or gradual abolishment of slavery . . . ." H. Hyman & W. Wiecek, Equal Justice Under Law 253-54 (1982).

33. H. Hyman, A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution 40-46 (1973) [hereinafter More Perfect Union]. The proposed amendment was to be irrepealable and unamendable. The

ity" by President Lincoln.[34] The reconstructionist policies of President Johnson, however, breathed new life into the old southern institution of slavery by shifting a substantial amount of power back to the Southern states. This allowed Southerners to legislate the transition from slavery to freedom, and thus enabled the Southern states to severely restrict the basic civil rights of Southern African-Americans.[35]

These policies were embodied in the Black Codes enacted by the Southern states.[36] In his opening remarks to the Senate in 1865, Senator Lymann Trumbull of Illinois criticized the Black Codes for discriminating against the freedmen because the codes "still impose[d] upon [African-Americans] . . . the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished."[37] The Black Codes reflected the desire of Southerners to cling to the old social order.[38] Growing concern that the South was reverting to its old ways and thus making a "mockery" out of the thirteenth amendment spurred Congress to pass a resolution making public a report written for President Johnson regarding the postwar condition of the South.[39] The report, prepared by Major General Carl Schurz, stated:

> The general government of the republic has, by proclaiming the emancipation of slaves, commenced a great revolution in the south, but has, as yet, not completed it. Only the negative part of it is

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amendment would have provided citizens the right to move into all nations and territories with all property they possessed, including slaves, and would have provided protection for that property. *Id.*

34. J. RICHARDSON, *supra* note 32, at 189-91. Lincoln, opposed to such legislation, wrote: "[W]hile I remain in my present position I shall not attempt to retract or modify the emancipation proclamation, nor shall I return to slavery any person who is free by the terms of that proclamation or by any of the acts of Congress." *Id.* at 190.

35. H. BELZ, EMANCIPATION AND EQUAL RIGHTS: POLITICS AND CONSTITUTIONALISM IN THE CIVIL WAR ERA 113-14 (1978). *See also* E. FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 189 (1988) (President Johnson's reconstruction policy empowered white southerners to define the status of African-Americans' civil rights); Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 548 (1989) [hereinafter Sullivan].

36. The Black Codes prohibited African-Americans from bearing arms, traveling freely among the states, educating former slaves, and preaching the Gospel. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

37. *Id. But see* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 13 (1955) (Bickel suggests that Senator Trumbull exaggerated the severity of the Black Codes in order to persuade Congress to pass his bill.).

38. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866). *See also* Franklin, *The Civil Rights Act of 1866 Revisited*, 41 HASTINGS L.J. 1135, 1141 (1990).

39. S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 2 (1865) (message of President Johnson accompanied by report submitted to President by Major General Carl Schurz regarding the racial animus of the South towards African-Americans and Union supporters). *See also* Sullivan, *supra* note 35, at 548-51.

> accomplished. The slaves are emancipated in point of form, but free labor has not yet been put in the place of slavery in point of fact.[40]

According to Major General Schurz, African-Americans in the South were being coerced into discriminatory labor contracts and punished indiscriminately, as though the old system of slavery was still in place.[41] Schurz's report included disturbing narratives depicting the severe physical abuse many former slaves were still being subjected to.[42] The report also noted that some Southerners still viewed the now free African-Americans as property.[43]

Scholars have debated the relevance of the Schurz report. In 1968, Justice Harlan wrote, in *Jones v. Alfred H. Mayer Co.*,[44] that the Schurz report had little influence on the drafting of the Civil Rights Act of 1866, as the report was rarely mentioned in the congressional debates.[45] A close analysis reveals, however, that this report was Senator Trumbull's principal resource in drafting his bill.[46] Moreover, the subject matter of the report was discussed at length during the debates.[47] Therefore, a more plausible argument is that Congress was so familiar with the report that direct reference was

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40. S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 38 (1865). The main issue viewed by Northerners and Southerners alike was free labor. The key to freedom for African-Americans was embedded in this issue. After a century of slavery, Southerners were not willing to negotiate labor contracts with their former slaves. *See* Sullivan, *supra* note 35, at 549.

41. *See generally* S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 1-108 (1865).

42. *Id.* at 88. The report noted one incident where an elderly African-American man was beaten about the head with a rod one inch in diameter "so severe[ly] as to snap the stick asunder," and another where a woman received a fractured skull and broken arm by the hand of a "vindictive planter." *Id.*

43. *Id.* at 89.

> The following is a literal copy of a document brought to this office by a colored man, which is conclusive evidence that there *are* those who still claim the negro as their property:
> "This boy Calvin has permit to hire to whome he please, but I shall hold him as my propperty untill set Free by Congress. July the 7, 1865.
> E.V. TULLY."

Id. (original emphasis).

44. 392 U.S. 409 (1968).

45. *Id.* at 462 n.28 (Harlan, J., dissenting) (In contrast, the majority found the Schurz report to be one of the most comprehensive studies before Congress.).

46. Sullivan, *supra* note 35, at 553 n.78.

47. *Id.* at 553. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 39-40 (1865) (Senator Wilson cited instances similar to those noted in the Schurz report which illustrated the oppressive and cruel treatment of African-American slaves in the South.); *Id.* at 93-95 (Senator Sumner cited activities by plantation owners to quash the free labor system and withhold wages from laborers.). *See also* Sullivan, *supra* note 35, at 562. Furthermore, the Senate's interest in this report was so great that it passed a resolution requiring that President Johnson release the report to the public. Cong. Globe, 39th Cong., 1st Sess. 78 (1865).

unnecessary.[48]

The prevailing conditions in the southern states, as evidenced in the Schurz report, prompted Congress to take concrete actions based upon its new thirteenth amendment authority.[49] The thirteenth amendment was added to the Constitution with the hope that "the Negro [would be] elevated to legal and civil equality, [and consequently,] the pulsing heart [of slavery] would be stilled and all the appendages would soon atrophy and disappear."[50] To accomplish this, Senator Trumbull felt that a congressional enactment was necessary to give credibility and force to the thirteenth amendment.[51] In his opening remarks to the Senate, he stated that his civil rights bill

> is intended to give effect to [the thirteenth amendment] and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits.[52]

In the debates that followed, several congressmen called for the total eradication of racial discrimination.[53] Senator Trumbull alluded to such a broad application of his civil rights bill by commenting that under the thirteenth amendment, Congress had the authority to pass a bill "much more sweeping and efficient" than a

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48. Sullivan, *supra* note 35, at 553 n.78.

49. *Id.* at 555. Subsequent to the ratification of the thirteenth amendment, a Joint Committee of Fifteen on Reconstruction was organized to monitor conditions in the South. This Committee was a significant change in legislative procedure. Joint committees made more efficient use of Congress' time, because "[t]hese joint standing committees allowed concentration of information, expertness, and talent and avoided duplication of effort or energy." MORE PERFECT UNION, *supra* note 33, at 183. *See generally* THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (reproduced in 62 COL. U. STUDIES (1914) (B. Kendrick ed.)).

50. J. TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 149 (1951).

51. Senator Trumbull stated:

> Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the [civil rights bill] under consideration is to destroy all these discriminations, and to carry into effect the constitutional amendment.

CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

52. *Id.*

53. *See generally* CONG. GLOBE, 39th Cong., 1st Sess. 39-40, 93-95, 1152, 1861 (1865-66). One congressman read from letters received from citizens throughout the southern states describing the deplorable conditions under which the former slaves lived. *Id.* at 93-95.

bill not founded upon the amendment.[54] Another senator later remarked:

> It was the purpose of [the thirteenth amendment] to relieve those who were slaves from all the oppressive incidents of slavery. . . . The amendment to the Constitution gave liberty to all; and in giving liberty it gave also a complete exemption from the tyrannical acts, the tyrannical restrictions, and the tyrannical laws which belong to the condition of slavery, and which it is the object of [the civil rights bill] forever to remove.[55]

In support of such a broad interpretation of section 1981, Justice Stewart noted in *Jones v. Alfred H. Mayer Co.*,[56] "that the bill would indeed have so sweeping an effect was seen as its great virtue by its friends and as its great danger by its enemies but was disputed by none."[57] Furthermore, the opponents of the bill on occasion attempted to minimize the racial animus of white Southerners but never argued whether the Civil Rights Act of 1866 would prevent such discrimination.[58]

The civil rights bill passed both the House of Representatives and the Senate only to be vetoed by President Johnson on March 27, 1866.[59] In the spring of that year, both the House[60] and the Senate[61] voted to override Johnson's veto and the bill became law pursuant to Congress' authority under section two of the thirteenth amendment.[62]

II. Statutory Interpretation

The degree of emphasis placed today on the congressional debates and reports surrounding the Civil Rights Act of 1866 depends upon the theory of statutory interpretation used by a court. Through the

54. Cong. Globe, 39th Cong., 1st Sess. 43 (1865). Senator Wilson of Massachusetts introduced a bill which provided for the eradication of "laws, statutes, acts, ordinances, rules and regulations" in any confederate state which created "any inequality of civil rights and immunities" based on "color, race, or . . . a previous condition . . . of slavery . . . ." *Id.* at 39.

55. Cong. Globe, 39th Cong., 1st Sess. 1152 (1866).

56. 392 U.S. 409 (1968).

57. *Id.* at 433. *See also* Cong. Globe, 39th Cong., 1st Sess. 500 (1866) (Sen. Cowan of Pennsylvania was concerned about the scope of the Civil Rights Bill.); *id.* at 602 (Sen. Hendricks of Indiana raised concerns about the bill's impact on current Indiana law.).

58. J. tenBroek, Equal Under Law 181 (1965).

59. Cong. Globe, 39th Cong., 1st Sess. 1679 (1866). The President sent Congress a message which explained, section by section, the reasons for his veto of the Civil Rights Bill. While recognizing an obligation to provide civil rights protection to freedmen, the President refused to sanction this legislation. *Id.* at 879-81.

60. *Id.* at 1861.

61. *Id.* at 1809.

62. *Id.* at 1861.

years, several theories of statutory interpretation have been espoused. These theories can be placed into three broad categories: the "intentionalist" approach;[63] the "textual" approach;[64] and, the "dynamic" approach.[65]

A. *Intentionalist Approach*

Courts most often use intentionalism when interpreting statutes.[66] Under this approach to statutory interpretation, the court examines

63. The intentionalist approach falls under a broader method of statutory interpretation called "Originalism." This method interprets the statute in light of the statute's original history and text rather than public policy or precedents. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980) [hereinafter Brest]. *Cf.* Aleinikoff, *supra* note 23, at 21. Another term associated with this method of interpretation is "archaeological." Under this method "the meaning of a statute is set in stone on the date of its enactment, and it is the interpreter's task to uncover and reconstruct that original meaning." *Id.*

64. The textualist approach is also included under Originalism but relies on statutory language as the primary or exclusive source of the law. *See* Brest, *supra* note 63, at 205.

65. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) [hereinafter *Dynamic Statutory Interpretation*]. Eskridge asserts that statutes should "be interpreted 'dynamically,' that is, in light of their present societal, political, and legal context." *Id.* at 1479; *see also* Brest, *supra* note 63, at 205 ("Nonoriginalism" accords the original text and history of a statute some weight but allows the interpretation to change "in light of changing experiences and perceptions."); Aleinikoff, *supra* note 23, at 21 (Nauticalism views statutory interpretation as an on-going process in which the judiciary plays a primary role in setting the statutory meaning based on the "mores of today.").

66. 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 45.05 (4th ed. 1984).

> For the interpretation of statutes, "intent of the legislature" is the criterion that is most often recited. . . . The reason for this lies in an assumption that an obligation to construe statutes so that they carry out the will, real or attributed, of the lawmaking branch of the government is mandated by principles of separation of powers.

Id. at 20-21. *See, e.g.*, United States v. Agrillo-Ladlad, 675 F.2d 905 (7th Cir. 1982) (examining the legislative history of the Organized Crime Control Act of 1970 and concluding that Congress intended burning newspapers to be within the meaning of an "explosive" device); Mills v. Ozark Bd. of Educ., 376 So. 2d 747 (Ala. Civ. App. 1979) (examining the history behind Alabama's workers' compensation law and concluding that the legislature intended for the term "school district" to include the controlling school board); Arizona Dept. of Revenue v. Maricopa County, 120 Ariz. 533, 587 P.2d 252 (1978) (concluding that the legislature intended an Arizona tax statute to lessen the tax burden for all property owners); California Mfrs. Ass'n v. Public Util. Comm'n, 24 Cal. 3d 836, 598 P.2d 836, 157 Cal. Rptr. 676 (1979) (concluding that utility rebates from suppliers qualified as rate refunds under the Public Utility Code based on the legislative history of the relevant statutes); Smith v. Cofer, 243 Ga. 531, 255 S.E.2d 49 (1979) (concluding that the Department of Natural Resources was not required to open state rivers to shrimp fishermen based on an examination of legislative history); *In re* Hawaiian Tel. Co., 61 Haw. 572, 608 P.2d 383 (1980) (concluding that the state legislature intended that certain public service revenue be excluded from state tax).

the history preceding the bill's enactment to determine what legal issues the legislature intended the statute to address.[67] Proponents claim an intentionalist approach is necessary because "words have no 'plain meaning'; meaning depends on context and usage."[68]

Under this theory a statute's meaning is fixed on the date of the statute's enactment.[69] If the answer to a particular issue is not evident within the statute, legislative materials must be examined to understand how Congress would have resolved the issue.[70] If the answer to a particular issue is evident within the statute, the statute's legislative history may still be examined if the plain meaning of the statute would produce an absurd or unreasonable result.[71]

The Supreme Court's decision in *Holy Trinity Church v. United States*[72] illustrates how the Court uses legislative intent to avoid such an absurd or unreasonable result. The Holy Trinity Church contracted with an English clergyman to travel to New York and become the rector and pastor of the church.[73] The United States brought suit claiming the contract was in violation of an 1885 statute which prohibited " 'any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States . . . .' "[74]

The Court conceded that the church had violated the plain meaning of the statute.[75] But a literal interpretation, the Court ruled, would lead to an absurd result.[76] The Court said:

> It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. . . . [F]requently words . . . are . . . broad enough to include an act in question, and yet a con-

67. Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 552-53 (2d Cir. 1914) (Statutes "should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them."). *See generally* Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983) [hereinafter Posner]; *Dynamic Statutory Interpretation*, *supra* note 65, at 1479; Aleinikoff, *supra* note 23, at 20; Brest, *supra* note 63, at 204.

68. Aleinikoff, *supra* note 23, at 23.

69. *Id.* at 23-24.

70. *See, e.g.*, Posner, *supra* note 67, at 819-20; Horak, *In the Name of Legislative Intention*, 38 W. VA. L.Q. 119, 121-25 (1931). *Cf.* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958) (Rather than stepping into the legislator's shoes, this approach merely states that statutory interpretation is based on the general purpose of the statute back when it was enacted.).

71. *See* Holy Trinity Church v. United States, 143 U.S. 457, 461 (1892).

72. 143 U.S. 457 (1892).

73. *Id.* at 458.

74. *Id.* (quoting Act of 1885, ch. 164, 23 Stat. 332).

75. *Id.*

76. *Id.* at 459.

> sideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.[77]

Upon examining the legislative history surrounding the statute, the Court concluded that the intended prohibition sought by Congress was the importation of cheap manual labor rather than clergy.[78]

Similarly, in 1979, the Supreme Court applied an intentionalist approach in a civil rights case involving Title VII. In *United Steelworkers of America v. Weber*,[79] the United Steelworkers Union of America entered into a collective bargaining agreement with Kaiser Aluminum and Chemical Corporation (Kaiser).[80] The agreement included an affirmative action plan which required that African-American employees comprise fifty percent of persons selected for Kaiser's craft training program.[81] Consequently, African-Americans were hired into the program before white employees with greater seniority were hired.[82] One such white employee, Brian Weber, initiated a class action. He alleged that the affirmative action plan discriminated against him and his fellow white employees in violation of Title VII of the 1964 Civil Rights Act.[83]

Specifically, Weber argued that sections 703(a) and (d) of Title VII prohibited employment discrimination based on race.[84] Weber also

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77. *Id.*

78. *Id.* at 463. The lower court did not agree with this interpretation. Citing section 5 of the statute, the lower court asserted that clergymen are not exempt because they do not fall within the specifically enumerated exceptions to the statute. The section five exemptions include professional actors, artists, lecturers, singers and domestic servants. The lower court stressed that it is a "well-settled rule of statutory interpretation" that a section which carves out exceptions to a statute is to be interpreted as providing the sole exceptions to the rule. Consequently, clergymen were not exempt from the statute. United States v. Church of the Holy Trinity, 36 F. 303, 305 (S.D.N.Y. 1888).

79. 443 U.S. 193 (1979).

80. *Id.* at 197-98. The plan was initiated to eliminate "conspicuous racial imbalances" in the Kaiser craftwork forces. *Id.* at 198. "Black craft hiring goals were set for each Kaiser plant equal to the percentage of blacks in the respective local labor forces." *Id.* In order to meet these goals, training programs were established to teach both African-American and white workers the necessary craftworker skills. *Id.*

81. *Id.*

82. *Id.* at 199.

83. *Id.* at 199-200.

84. *Id.* Section 703(a) (codified as amended at 42 U.S.C. § 2000e-2(a) (1982)) provides:

> (a) It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any indi-

argued that, because the Supreme Court had previously held that Title VII forbids discrimination against whites,[85] the affirmative action plan discriminated against Weber and his fellow white employees.[86]

Justice Brennan, writing for the majority, used *Holy Trinity Church* to rebut Weber's literal interpretation of the statute.[87] Brennan concluded that a literal reading of the relevant sections produced a result that conflicted with the "spirit" of the statute:

> The prohibition against racial discrimination in §§ 703(a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose. Examination of those sources makes clear that an interpretation of the sections that forbade all race-conscious affirmative action would "bring about an end completely at variance with the purpose of the statute" and must be rejected.[88]

Justice Brennan determined that the legislative intent of Title VII was to elevate African-Americans to the same level of employment as whites.[89]

In his dissent, Chief Justice Burger criticized the majority for overstepping the proper boundaries of judicial interpretation.[90] The Chief Justice asserted that the majority's interpretation was "contrary to the explicit language of the statute and arrived at by means wholly incompatible with long-established principles of separation of

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> vidual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1982). Section 703(d) (codified as amended at 42 U.S.C. § 2000e-2(d)) provides:

> (d) . . . It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

42 U.S.C. § 2000e-2(d) (1982).

85. United Steelworkers of Am. v. Weber, 443 U.S. 193, 201 (1979). In McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), three employees, two white and one black, were charged with misappropriating company property. Only the white employees, however, were discharged. Consequently, the white employees sued the company under section 1981. The Court concluded that section 1981 applies to " '*all* persons' . . . including white persons." *Id.* at 287 (quoting 42 U.S.C. § 1981) (original emphasis). The Court took a characteristically intentionalist approach to interpreting section 1981, relying heavily on the statute's legislative history. *See id.* at 287-96.

86. *Weber*, 443 U.S. at 201.

87. *See id.*

88. *Id.* at 201-02 (quoting United States v. Public Util. Comm'n, 345 U.S. 295, 315 (1953)) (citations omitted).

89. *Id.* at 202-03.

90. *Id.* at 216-17 (Burger, C.J., dissenting).

powers."[91]

A close analysis of both the majority and dissenting opinions reveals the difficulty the Court had with using the intentionalist approach. In his dissenting opinion, Justice Rehnquist recounted several debates which indicated that Congress did not intend the statute to create mandatory or voluntary quotas.[92] This conclusion is not as clear as Justice Rehnquist asserts. Nowhere in the legislative history cited by Justice Rehnquist does Congress explicitly state that the statute prohibits mandatory or voluntary quotas.[93]

The majority encountered similar difficulty arguing in favor of quotas. Justice Brennan ignored substantially all of the history noted by the dissent, relying instead on the intent of Title VII espoused by the House Judiciary Committee report: obtaining more jobs for blacks.[94] This interpretation, however, is in sharp contrast to another purpose of the statute: creating a colorblind society.[95] Justice Brennan failed to reconcile these two conflicting purposes of Title VII.

A better approach to interpreting Title VII would be to read the statute within the context of contemporary societal and political sentiment toward racial equality, that is, around the time, of *Weber*. At that point in time, "American society came to understand that the invidious effects of discrimination might last long after the discrimination itself ceased and that more affirmative measures were needed to afford any reasonable chance for a color-blind society in the future."[96] Thus, an interpretation of Title VII in light of current societal beliefs provides a persuasive argument for mandatory quotas. This interpretation is in accord with the dynamic approach to statutory interpretation.[97]

Although the intentionalist approach is widely accepted and often leads to a rational conclusion, the majority and dissenting opinions in *Weber* illustrate that the intentionalist approach is not without pitfalls. One pitfall is the "public choice theory."[98] This theory asserts

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91. *Id.* at 216.

92. *Id.* at 231-53 (Rehnquist, J., dissenting).

93. *See Dynamic Statutory Interpretation*, *supra* note 65, at 1490-91.

94. *Id.* at 1491 (citing United Steelworkers of Am. v. Weber, 443 U.S. 193, 201-04 (1979)).

95. *Id.* at 1491.

96. *Id.* at 1492.

97. *See infra* notes 138-62 and accompanying text (defining and explaining the dynamic approach).

98. *See* Aleinikoff, *supra* note 23, at 28.

> "Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that

that, because "legislation is the product of compromises among groups, . . . attributing a purpose to a statute either may improperly privilege the interests of one group over another (thereby undermining the bargain) or may impute a purpose where none (other than the desire to reach agreement) existed."[99] The theory also contends that not all statutes are created for reasonable purposes.[100] Therefore, a court, by examining the history of a statute, may inadvertently be asserting that court's own policy rather than that of the legislature.[101]

Another pitfall involves the freedom of judicial interpretation afforded the courts under an intentionalist approach. The holding in *Holy Trinity Church* demonstrates that a court can ignore the language of a statute and assert its own judicial policy based on its interpretation of the legislature's intent.[102] As Chief Justice Burger noted in *Weber*, however, this approach raises separation of powers issues.[103] Intentionalism allows a court to determine the policy or purpose of a statute on behalf of the legislature when the statute itself is unclear or renders an outcome contrary to public policy.[104] As Justice Rehnquist pointed out in *Weber*, the majority failed to adhere "to the oft-stated principle that our duty is to construe rather than rewrite history."[105]

Another pitfall may be characterized as "legislative laziness." Legislators may spend less time, or use less care in drafting statutes, understanding that the courts will clarify any ambiguities.[106] Intentionalism may also encourage legislative reports and floor debates geared toward future interpretation of the statute rather than toward drafting the statute itself.[107]

These pitfalls act to restrain the use of intentionalism to limited

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> intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent."

Id. at 28 n.42 (quoting Board of Governors v. Dimension Fin. Corp., 474 U.S. 361, 373-74 (1986)).

99. *Id.* at 28.

100. *Id.*

101. *Id.*

102. Holy Trinity Church v. United States, 143 U.S. 457, 472 (1892) (refusing to apply a federal statute to an action "which the whole history and life of the country affirm could not have been intentionally legislated against").

103. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 216 (1979) (Burger, C.J., dissenting) ("Court's judgment . . . arrived at by means wholly incompatible with long-established principle of separation of powers").

104. *See generally* S. MERMIN, *supra* note 23, at 251.

105. *Weber*, 443 U.S. at 221 (Rehnquist, J., dissenting).

106. Aleinikoff, *supra* note 23, at 29.

107. *See* W. ESKRIDGE & P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 698-752 (1988).

situations. As illustrated by *Holy Trinity Church*, intentionalism works best when a literal interpretation renders an absurd result in light of a statute's legislative history.[108] The *Weber* case, however, illustrates that intentionalism loses much of its persuasive power if the legislative history is vague or fraught with contradictions.

B. Textual Approach

Another form of statutory interpretation, currently experiencing a resurgence[109] in application through use by some justices on the Supreme Court, is often referred to as the "textual approach." Under this approach, the legislative history surrounding a statute is deemed irrelevant.[110] Justice Holmes, an advocate of textualism, noted: "We do not inquire what the legislature meant; we ask only what the statute means."[111] Supporters of this view[112] contend that only the language enumerated in the statute is law: "Unenacted intentions, no matter how resolutely stated in legislative materials, cannot be authoritative because they have not been adopted according to constitutionally prescribed procedures."[113] The "plain meaning"

108. Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892).

109. *See infra* note 112.

110. *See supra* note 23.

111. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

112. The textual approach has been gaining support in recent years. One reason courts are reluctant to interpret statutes broadly is that such an interpretation amounts to "rewriting rules" created by a separate branch of government. *See* Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978).

See also R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 9-10 (1975) (Giving weight to legislative history in the process of interpreting statutes circumvents the constitutional requirement of executive participation in lawmaking.); Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 442-43 (1988) (discussing legislators' and judges' reaction to Justice Scalia's "extreme approach" of disregarding legislative history); Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 375 (1987) ("[D]angers inherent in the use of legislative history generally outweigh the arguable advantages resulting from its use."). *But see* Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U.L.Q. 2, 25 (1939) (Rule "would have the effect . . . of withdrawing from the consideration of judges the facts which constitute the necessary basis of effective statutory interpretation.") [hereinafter Jones]; Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U.L. REV. 277, 303 (1990) (disfavoring textual approach because "judicious resort to legislative history is an indispensable part" of judicial interpretation).

Two other prominent "plain meaning" advocates are Justice Scalia and Judge Easterbrook of the Seventh Circuit Court of Appeals. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 453 (1987) (Scalia, J., concurring) ("Where the language . . . is clear, we are not free to replace it with an unenacted legislative intent."); Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988) ("[T]he words of the statute, and not the intent of the drafters, are the 'law.' ").

113. Aleinikoff, *supra* note 23, at 23.

of the statute prevails under this approach.[114] Proponents of this textual approach argue that the plain meaning serves as a reasonable approximation of actual legislative intent.[115]

In 1917, the Supreme Court adopted the textual approach in *Caminetti v. United States*.[116] Caminetti was charged with transporting a woman from Sacramento, California to Reno, Nevada where she was to "become his mistress and concubine."[117] The Court found Caminetti's actions to be in direct violation of the White Slave Traffic Act of 1910,[118] which prohibited the interstate transportation of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose . . . ."[119]

The Court's holding was based on the literal meaning of the White Slave Traffic Act rather than an examination of extrinsic legislative intent.[120] The Court noted that "[s]tatutory words are uniformly presumed . . . to be used in their ordinary and usual sense, and with the meaning commonly attributed to them."[121] Applying this rule, the Court stated that to construe the transportation of a woman for the purpose of making her a "mistress or concubine" as anything

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114. The legislative purpose of a statute is expressed within the words of the statute. In order to understand this purpose, the words are assigned their ordinary meaning. United States v. James, 478 U.S. 597, 606 (1986). This view presumes that the legislative intent is to have statutes interpreted in accordance with the "plain meaning" of their words. *See* Jones, *supra* note 112, at 6.

115. Aleinikoff, *supra* note 23, at 23. *See generally* Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990).

116. 242 U.S. 470 (1917).

117. *Id.* at 482-83.

118. *Id.* at 486.

119. *Id.* at 488 n.1. At the time of *Caminetti*, the then-entitled White Slave Traffic Act specifically provided:

> That any person who shall knowingly transport . . . in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice . . . shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or both . . . .

White Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (current version at 18 U.S.C. §§ 2421-2424 (1988)).

120. *Caminetti*, 242 U.S. at 490. In support of the textual approach, the Court noted:

> [I]t has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.

Id.

121. *Id.* at 485-86.

other than immoral within the meaning of the statute "would shock the common understanding of what constitutes an immoral purpose when those terms are applied, as here, to sexual relations."[122] Thus, *Caminetti* illustrates the conditions under which the textual approach works best: when the statute at issue is clearly written and a literal interpretation fits in with current societal perceptions regarding the evils sought to be eliminated by the statute.

Similarly, the textual approach may apply when the literal meaning of a statute is in concert with its legislative history. In *INS v. Cardoza-Fonseca*,[123] Justice Scalia, a proponent of textualism,[124] rejected the majority's adherence to an intentionalist approach, suggesting that a textual approach would have rendered the same outcome.[125] The case involved a Nicaraguan immigrant who was living illegally in the United States.[126] In an attempt to avoid deportation, Cardoza-Fonseca claimed she was a refugee pursuant to section 208(a) of the 1980 Refugee Act.[127] The Refugee Act provided in part that the Attorney General may grant asylum to an alien who is unwilling to return to her country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ."[128]

The immigration judge denied Cardoza-Fonseca asylum.[129] The judge applied an objective standard requiring Cardoza-Fonseca to show a "clear probability of persecution" upon returning to Nicaragua in order to fit within section 243(h).[130] The judge held that Cardoza-Fonseca had not met that standard.[131] The Supreme Court rejected this standard and applied a subjective one which required that Cardoza-Fonseca prove only a "well-founded fear of persecution"[132] upon returning to her country.[133] The majority based its conclusion on a literal reading of the statute supported by an "ex-

122. *Id.* at 486.

123. 480 U.S. 421 (1987).

124. *See, e.g.*, United States v. Taylor, 487 U.S. 326, 344-45 (1988) (Scalia, J., concurring); Hirschey v. FERC, 777 F.2d 1, 6-8 (D.C. Cir. 1985) (Scalia, J., concurring).

125. INS v. Cardoza-Fonseca, 480 U.S. 421, 452-55 (1987) (Scalia, J., concurring).

126. *Id.* at 424.

127. *Id.*

128. 8 U.S.C. §§ 1101(a)(42)(A), 1158(a) (1988).

129. *Cardoza-Fonseca*, 480 U.S. at 425.

130. *Id.* The precise language of section 243(h) provides: "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h) (1988).

131. *Cardoza-Fonseca*, 480 U.S. at 425.

132. 8 U.S.C. § 1101(a)(42)(A) (1988).

133. *Cardoza-Fonseca*, 480 U.S. at 428-42.

haustive investigation of the legislative history."[134]

Justice Scalia objected to this lengthy investigation, noting that "[j]udges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."[135] This analysis suggests that because the word "fear" connotes the subjective feelings of the one unwilling to leave the country, a literal interpretation of the statute reveals that a subjective standard must apply to section 208(a).

Although *Cardoza-Fonseca* demonstrates when the textual approach is clearly applicable, circumstances may arise which make application of this approach difficult. In *Caminetti*, the Court noted the plain language controls unless "absurd or wholly impracticable consequences" would result.[136] When does a literal interpretation of a statute result in an "absurd or wholly impracticable" result? The Court addressed this question in *Holy Trinity Church* and concluded that a literal interpretation may be too broad, creating a result which is unreasonable and contrary to the legislature's original intent.[137]

C. *Dynamic Approach*

The third approach to statutory interpretation is not bound by the meaning[138] or purpose[139] of the statute as fixed on the date of enactment. Instead, the dynamic approach is similar to the common law in application.[140] Proponents believe that statutes "should—like the Constitution and the common law—be interpreted 'dynamically,' that is, in light of their present societal, political, and legal context."[141] The "best" interpretation is that which is most in harmony "with our current 'web of beliefs' and policies surrounding the statute."[142] The dynamic approach is used in two situations: (1) when

134. *Id.* at 452 (Scalia, J., concurring).

135. *Id.* at 452-53.

136. Caminetti v. United States, 242 U.S. 470, 490 (1917).

137. Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892).

138. The concept of interpreting a statute based on that statute's meaning is associated with textualism. *See supra* note 23.

139. An interpretation of a statute based on that statute's purpose, as seen in light of the relevant legislative history, is an approach illustrative of intentionalism. *See supra* note 63.

140. "[S]tatutes should be interpreted similarly to the common law, with the judicial interpreter determining in each case what is the 'best' application of the statute in light of current circumstances." *Dynamic Statutory Interpretation*, *supra* note 65, at 1479 n.1 (citing R. DWORKIN, LAW'S EMPIRE 313-54 (1986)).

141. *Dynamic Statutory Interpretation*, *supra* note 65, at 1479.

142. *Id.* at 1483. *Cf.* Farber & Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1617 (1987) (In the context of the first amendment analysis, "confining reason to logical deduction from set premises, foundationalism curtails the use of our most powerful problem-solving abilities.").

the text of the statute and its legislative history are ambiguous; or, (2) when a literal interpretation differs from the "spirit" of the statute and is inconsistent with current societal beliefs.[143]

Justice Stevens, a proponent of the dynamic approach,[144] applied that approach in *Johnson v. Transportation Agency*.[145] In 1978, the Santa Clara County Transit District Board of Supervisors adopted an affirmative action plan (Plan) for the county transportation agency (Agency).[146] The purpose of the Plan was to increase female employment in jobs where women were significantly under-represented.[147] Consequently, the Plan allowed the Agency to consider gender when determining an applicant's qualifications for promotion.[148]

In accordance with the Plan, the Agency promoted a female employee rather than a male applicant named Paul Johnson.[149] Johnson sued the Agency alleging that he had been denied the promotion based on his gender, in violation of Title VII.[150] Justice Brennan, writing for the majority, relied on *Weber* to uphold the Plan.[151] As in *Weber*, Justice Brennan here noted that "an employer seeking to justify the adoption of a plan . . . need point only to a 'conspicuous . . . imbalance in traditionally segregated job categories.' "[152] Although the *Weber* decision only examined the legislative history of Title VII as that history related to African-Americans, Justice Brennan, under the guise of an intentionalist approach, nevertheless applied the

143. *Dynamic Statutory Interpretation*, *supra* note 65, at 1481-84.

144. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 219-22 (1989) (Stevens, J., concurring in part and dissenting in part); Johnson v. Transportation Agency, 480 U.S. 616, 642-47 (1987) (Stevens, J., concurring); Runyon v. McCrary, 427 U.S. 160, 189-92 (1976) (Stevens, J., concurring). *See also* Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087, 1137 (1989) ("[Justice Stevens] adopts an approach to statutory interpretation that defers to legislative language, yet also shows concern for case-by-case adjudication and individual dignity.").

145. 480 U.S. 616 (1987).

146. *Id.* at 620. The county adopted the affirmative action plan because " 'mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons.' " *Id.* (quoting application to petition for certiorari).

147. *Id.* at 620-21. While 36.4% of the county's labor force was female, only 22.4% of the agency's employees were women. *Id.* at 621.

148. *Id.* at 620-21.

149. *Id.* at 624-25.

150. *Id.* at 625.

151. *Id.* at 627. The Court noted that the *Weber* decision "was grounded in the recognition that voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts." *Id.* at 630 (citation and footnote omitted).

152. *Id.* (quoting United Steelworkers of Am. v. Weber, 443 U.S. 193, 209 (1979)).

Weber rationale in *Johnson*.[153]

Justice Brennan would have done better to discard the intentional approach in light of the peculiar situation in *Johnson*, and align himself with Justice Stevens' approach to interpreting Title VII. In his concurring opinion, Justice Stevens implied that the Court should no longer be constrained by legislative history in interpreting Title VII.[154] Justice Stevens stated that "[t]he logic of antidiscrimination legislation requires that judicial constructions of Title VII leave 'breathing room' for employer initiatives to benefit members of minority groups."[155] From this, Justice Stevens could conclude that Title VII would also support gender-based preferential hiring plans,[156] despite the clear indication in Weber that Title VII was meant to target racial discrimination.[157]

Both *Weber* and *Johnson* suggest the dynamic approach: "[W]hen societal conditions change in ways not anticipated by Congress and, especially, when the legal and constitutional context of the statute decisively shifts as well, this current perspective should, and will, affect the statute's interpretation, notwithstanding contrary inferences from the historical evidence."[158] Thus, a dynamic approach will work best when old and vaguely written statutes must be applied to circumstances never contemplated by Congress. In these circumstances, some deference should be given to current societal beliefs and perspectives on the issue, provided these considerations are consistent with the statute's legislative intent.

Some critics claim that under the dynamic approach the judiciary is conferring upon itself a power which was not delegated to it under the Constitution. Specifically, the argument is that "the Constitution's separation of powers gives all lawmaking power to Congress and none to the federal courts and that intentionalism is the only mode of statutory interpretation that is consonant with this constitutional division of functions."[159]

Other critics take a less severe position on "judicial lawmaking."

153. *Id.* at 627-28.

154. *Johnson*, 480 U.S. at 645-46 (Stevens, J., concurring).

155. *Id.* at 645.

156. Justice Stevens concluded that Title VII was not intended to "absolutely prohibit preferential hiring in favor of minorities; it was merely intended to protect historically disadvantaged groups *against* discrimination and not to hamper managerial efforts to benefit members of disadvantaged groups that are consistent with that paramount purpose." *Id.* at 646. Because of his allowance for "breathing room" in the interpretation of Title VII, Justice Stevens can easily segue from a view of the statute as protecting "minorities," to one where Title VII instead protects "disadvantaged groups."

157. United Steelworkers of Am. v. Weber, 443 U.S. 193, 201-04 (1979).

158. *Dynamic Statutory Interpretation*, *supra* note 65, at 1494.

159. *Id.* at 1498-99.

They claim that a court's lawmaking authority is limited by legislative approval. This view necessarily restricts a court's statutory interpretation to the textual or intentionalist approach.[160]

These criticisms fail to recognize the cost involved, both in time and money, for Congress to amend statutes to cover every new situation not contemplated by the drafters.[161] Furthermore, legislative inaction in cases like *Weber* and *Johnson* demonstrates congressional approval of the dynamic approach to statutory interpretation.[162]

III. STATUTORY INTERPRETATION OF THE CIVIL RIGHTS ACT OF 1866

From the inception of the Civil Rights Act of 1866 (Act), the Supreme Court has applied all three forms of statutory interpretation to some degree. Early civil rights cases, such as *Hodges v. United States*,[163] illustrate a restricted and literal interpretation of the Act.

In *Hodges*, a group of white citizens terrorized African-Americans to prevent them from working in a sawmill.[164] An action was brought for conspiracy to prevent African-Americans from entering into contracts for employment.[165] The *Hodges* Court noted that "one of the disabilities of slavery, one of the indicia of its existence, was a lack of power to make or perform contracts . . . ."[166] The Court, however, narrowly interpreted the term "slavery"[167] and inferred

160. *Id.* at 1498-1503.

161. *See* Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 458-60 (1988). In an amicus brief to the Supreme Court, a number of members of Congress noted an even greater cost, arguing:

> Any congressional effort to change a decision of this Court [in *Runyon v. McCrary*] could prove divisive and time consuming, could well be delayed by disagreement over collateral issues, and could confront grave difficulties in addressing the nuances that have arisen from case-by-case elaboration of the statute. But with regard to one of the core civil rights statutes, the costs are far greater. To require the Congress to revisit this issue could jeopardize the closure and repose that we have obtained as a Nation on the issue of racial discrimination.

Amicus Brief in Support of Petitioner at 28, Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (No. 87-107) (submitted by 66 Members of the United States Senate and 118 Members of the United States House of Representatives).

162. *See* Amicus Brief in Support of Petitioner at 28, Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (No. 87-107). *See generally* Eskridge, *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988).

163. 203 U.S. 1 (1906).

164. *Id.* at 3.

165. *Id.* at 2 (a right secured by the Civil Rights Act of 1866, codified at 42 U.S.C. § 1981 (1988)).

166. *Id.* at 17.

167. *Id.* at 18. The Court stated that "no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery." *Id.* The Court then quoted from the respondent's brief which conceded that the United States Constitution does not secure any citizen " 'the right to work at a given occupa-

that an African-American must actually be enslaved before the thirteenth amendment or any related legislative act would apply.[168]

The *Hodges* Court adopted a textual approach. No reference was made to legislative history. Rather, the Court focused upon the meaning of the term "slavery."[169] At one point in the opinion, the Court cited the Webster Dictionary definition of slavery as " 'the state of entire subjection of one person to the will of another.' "[170] The plain meaning of slavery operated to exclude the plaintiffs from protection under the Act[171] as they had the freedom to seek employment elsewhere.

Hodges represented the apex of judicial restraint on statutory interpretation of the Act.[172] The effects of such a narrow construction of section 1981 were felt for decades after the decision. Sixty-two years later, in *Jones v. Alfred H. Mayer Co.*,[173] the Supreme Court reversed *Hodges* and began to interpret section 1981 broadly,[174] an approach more consistent with the congressional determination to eradicate racial animus.[175] In *Jones*, a white homeowner refused to sell his house to an African-American couple solely because of their race.[176] The couple sued the homeowner, alleging violation of 42 U.S.C. § 1982[177] which provides: "All citizens of the United States shall

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tion or particular calling free from injury, oppression, or interference by individual citizens.' " *Id.*

168. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 n.78 (1968). The Court in *Jones* referred to the narrow interpretation of the term "slavery" in *Hodges*, which "asserted that only conduct which actually enslaves someone can be subjected to punishment under legislation enacted to enforce the Thirteenth Amendment." *Id.* at 442 n.78. The *Jones* Court then expressly overruled *Hodges*, noting: "The conclusion of the majority in *Hodges* rested upon a concept of congressional power under the Thirteenth Amendment irreconcilable with the position taken by every member of this Court in the *Civil Rights Cases* and incompatible with the history and purpose of the Amendment itself." *Id.* at 442-43 n.78.

169. After quoting the thirteenth amendment, the Court stated: "The meaning of [the thirteenth amendment] is as clear as language can make it. The things denounced are slavery and involuntary servitude . . . ." Hodges v. United States, 203 U.S. 1, 16 (1906).

170. *Id.* at 17.

171. The Court stressed that, "[w]hile the inciting cause of the Amendment was the emancipation of the colored race, . . . [the amendment] is not an attempt to commit that race to the care of the Nation." *Id.* at 16.

172. Comment, *Developments in the Law—Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29, 63-64 (1980) [hereinafter *Developments in the Law*].

173. 392 U.S. 409 (1968).

174. *See supra* note 168. *See also* Refsin, *The Lost Clauses of Section 1981: A Source of Greater Protection After Patterson v. McLean Credit Union*, 138 U. PA. L. REV. 1209, 1220-21 (1990) (The *Jones* decision "revitalized the 1866 Act.").

175. *See infra* note 199 and accompanying text.

176. *See Jones*, 392 U.S. at 412. The couple sought injunctive and other relief provided under 28 U.S.C. § 1343(4). *Id.* at 412 n.1.

177. *Id.*

have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[178] In *Jones*, the Court directly addressed for the first time whether section 1982 applied to private acts of discrimination.[179]

The Court began its analysis with section two of the thirteenth amendment, which empowers Congress to enforce section one with appropriate legislation.[180] While the enactment of section 1982 was within the powers granted by the thirteenth amendment, this was not determinative of the issue. The Court therefore examined the legislative history of the Act.[181] Based on an exhaustive analysis of Senate debates and reports, the majority concluded: " 'We are not at liberty to seek ingenious analytical instruments' to carve from § 1982 an exception for private conduct—even though its application to such conduct in the present context is without established precedent. . . . 'The fact that the statute lay partially dormant for many years cannot be held to diminish its force today.' "[182] The majority interpreted the legislative purpose of the Act to prohibit private acts of discrimination which prevent African-Americans from purchasing real estate.[183]

The dissent in *Jones* used the same approach in interpreting section 1982 but came to the opposite conclusion.[184] Justice Harlan concluded that the language of the statute was unclear.[185] Specifically, Justice Harlan asserted that the term "right" might refer to either the "right to equal status under the law, in which case the statute operates only against state-sanctioned discrimination, or it may be an 'absolute' right enforceable against private individuals."[186] Consequently, the dissent performed its own lengthy analysis of pertinent legislative materials surrounding the Act.[187] A strong case was presented which indicated that the Act was intended only to prevent

178. 42 U.S.C. § 1982 (1988) (recodifying section 1 of the Civil Rights Act of 1866).

179. *Jones*, 392 U.S. at 419-20 (The Court cited to dictum in Hurd v. Hodge, 334 U.S. 24 (1948), which indicated section 1982 applied only to governmental action.).

180. *Id.* at 437-38.

181. *See id.* at 439-43.

182. *Id.* at 437 (quoting United States v. Price, 383 U.S. 787, 801 (1966) and the Attorney General of the United States) (citations omitted).

183. *Id.* at 443 (stating Congress is empowered under the thirteenth amendment to ensure African-Americans equal choice in housing).

184. *Id.* at 450 (Harlan, J., dissenting).

185. *Id.* at 452-53 (Unlike the majority, Justice Harlan did not feel that section 1982 was plain and unambiguous.).

186. *Id.* at 453. Justice Harlan stated that the words of section 1982 indicated that "right" refers to the right to equal status under the law. *Id.*

187. *See id.* at 455-73.

discrimination by the state.[188]

Jones illustrates the Court's intention to defer to legislative history when the language of a statute is unclear.[189] Although the precedent set by *Jones* was neither rooted in clear legislative intent nor unambiguous statutory language, the decision marked the beginning of a new era in civil rights litigation based on private acts of discrimination.[190] The Supreme Court later extended this interpretation to section 1981 and private acts of employment discrimination.[191]

The *Jones* decision was challenged eight years later in *Runyon v. McCrary*.[192] In *Runyon*, several African-American couples were prevented from enrolling their children in private schools which accepted only "caucasian" students.[193] The schools asserted a constitutional right to deny African-American applicants admission based on claims of freedom of association and right of privacy.[194] Citing the precedent established in *Jones*, the *Runyon* Court held that section 1981 was applicable to private acts of discrimination.[195] Similar to the dissent in *Jones*, the dissent in *Runyon* reiterated that the legislative history of section 1981 did not indicate an intent to cover private acts, such as the right to make private contracts.[196]

In his concurring opinion, Justice Stevens took a strikingly different approach to interpreting section 1981. He concluded:

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188. *Id.*

189. The *Jones* decision best illustrates the intentionalist approach to interpreting the 1866 Civil Rights Act. Both the majority and dissent performed an exhaustive inquiry into the origins of the Act. The *Jones* decision also illustrates the drawback of this approach. Specifically, the *Jones* Court revealed the ambiguity surrounding the Reconstruction Congress' intended purpose of the Act. *See generally* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

190. *See Developments in the Law*, *supra* note 172, at 66-69.

191. *See* Johnson v. Railway Express Agency, 421 U.S. 454 (1975). In *Johnson*, a group of African-American railway employees claimed their employer discriminated against them with respect to seniority rules and job assignments. *Id.* at 455. The African-American employees sued under section 1981 and Title VII. *Id.* at 456. The Court allowed recovery under Title VII but not section 1981, as the statute of limitations had run. *Id.* at 462-63. The Court stated, however, that "it is well settled . . . that § 1981 affords a federal remedy against discrimination in private employment on the basis of race." *Id.* at 459-60.

192. 427 U.S. 160 (1976).

193. *Id.* at 165.

194. *Id.* at 166-70, 175 (The Court recognized that the first amendment fosters the development of public and private points of view.).

195. *Id.* at 173-75. The interpretation of section 1981 is reaffirmed in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) and in Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973). *Id.* at 175 n.10.

196. *See id.* at 194 (1976) (White, J., dissenting). The dissent concluded: "[T]he legislative history of § 1981 unequivocally confirms that Congress' purpose in enacting that statute was solely to grant to all persons equal capacity to contract as is enjoyed by whites and included no purpose to prevent private refusals to contract, however motivated." *Id.* at 205.

> [E]ven if *Jones* did not accurately reflect the sentiments of the Reconstruction Congress, it surely accords with the prevailing sense of justice today.
>
> The policy of the Nation as formulated by the Congress in recent years has moved constantly in the direction of eliminating racial segregation in all sectors of society. This Court has given a sympathetic and liberal construction to such legislation. For the Court now to overrule *Jones* would be a significant step backwards.[197]

Disregarding the unclear intent of Congress, Justice Stevens adopted the dynamic approach in interpreting section 1981.[198] This approach to interpreting section 1981 is most persuasive, in light of the goals of the statute. Although Congress did not specifically address the issue of private discrimination under the Act, the holding in *Runyon* is in accord with the Reconstruction Congress' goals of eradicating racial discrimination. Furthermore, these goals remain the goals of Congress today.[199]

IV. *PATTERSON V. MCLEAN CREDIT UNION*

The Court's liberal interpretation of section 1981 came to an end in *Patterson v. McLean Credit Union*.[200] Brenda Patterson brought an action against her employer, McLean Credit Union, for racial harassment[201] under 42 U.S.C. § 1981.[202] The district court granted a di-

197. *Id.* at 191 (Stevens, J., concurring) (footnotes omitted).

198. Justice Stevens stated that overruling *Jones* "would be . . . contrary to my understanding of the mores of today . . . ." *Id.* at 191-92. The civil rights legislation in place at that time included:

> [T]he Civil Rights Act of 1964, 78 Stat. 241, as added and as amended, 28 U.S.C. § 1447(d), 42 U.S.C. §§ 1971, 1975a-1975d, 2000a—2000h-6 (1970 ed. and Supp. IV); the Voting Rights Act of 1965, 79 Stat. 437, as added and as amended, 42 U.S.C. §§ 1973-1973bb-4; the Civil Rights Act of 1968, Titles VIII, IX, 82 Stat. 81, 89, as amended, 42 U.S.C. §§ 3601-3631 (1970 ed. and Supp. IV).

Id. at 191 n.4.

199. *See generally* Amicus Brief in Support of Petitioner, Patterson v. McLean Credit Union, 491 U.S. 164 (1989). During the congressional debates over the Civil Rights Bill of 1990, Rep. Washington remarked:

> Now is the time to overcome, forever, the dark days of the period of our history which can only be looked upon with shame. Now is the time to overcome the effects of 58 years of legal discrimination in this country. Now is the time to overcome 94 years of the vestiges of Dred Scott, Slaughter House, and Civil Rights cases and Plessy versus Ferguson. Now is the time for a new order in our country.

136 CONG. REC. H9978, H9980 (daily ed. Oct. 17, 1990) (statement of Rep. Washington).

200. Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

201. The court of appeals summarized Patterson's testimony about the racial harassment she was subject to as follows:

> "[that her supervisor] periodically stared at her for several minutes at a time; that he gave her too many tasks, causing her to complain that she was under too much pressure; that among the tasks given her were sweeping

rected verdict in favor of McLean Credit Union. The Fourth Circuit Court of Appeals affirmed the district court's decision.[203] The Supreme Court granted certiorari to decide whether a cause of action for postcontract formation racial discrimination was actionable under section 1981.[204]

In addressing this issue, the Court, *sua sponte*, ordered the parties to argue the additional issue of whether section 1981 covers private conduct.[205] The Court upheld the *Runyon* decision, concluding that section 1981 did in fact extend to private contracts.[206] Writing for the Court, Justice Kennedy stated that *Runyon* had not been undermined by changes in the law[207] or by changes in society's commitment to eliminating discrimination.[208] Furthermore, the Court found no special justification for deviating from the doctrine of *stare decisis*.[209]

Nevertheless, the *Patterson* majority determined that a cause of ac-

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and dusting, jobs not given to white employees. On one occasion [her supervisor] told [her] that blacks are known to work slower than whites. [Her supervisor] also criticized her in staff meetings while not similarly criticizing white employees."

Id. at 178 (quoting Patterson v. McLean Credit Union, 805 F.2d 1143, 1145 (1986)).

202. *Patterson*, 491 U.S. at 169. In her original pleading, Patterson also asserted a claim for failure to promote and for wrongful discharge in addition to a pendent state claim for intentional infliction of mental and emotional distress. The district court submitted the promotion and discharge claims to a jury which found for McLean Credit Union. In addition, the court granted a directed verdict in favor of McLean Credit Union on the emotional distress claim. *Id.* at 170; *see also* Patterson v. McLean Credit Union, 805 F.2d 1143, 1144 (1986).

203. Patterson v. McLean Credit Union, 805 F.2d 1143 (1986).

204. *Patterson*, 491 U.S. at 170. Additionally, the Court granted certiorari to determine whether the district court erred in its jury instructions regarding Patterson's promotion claim, and held that the lower court did so err. *Id.* at 170-71. The Court also stated that an employee may present various types of evidence to prove that an employer's proffered reasons for termination are pretextual. *Id.* at 187-88.

205. *Id.* at 170-71. Several legal scholars have theorized on the impact that restricting section 1981 from covering private conduct would have on statutory interpretation and the scope of the statute. *See, e.g.*, Aleinikoff, *supra* note 23; Eisenberg & Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596 (1988) (regarding the "quantitative importance" of section 1981 litigation); *Dynamic Statutory Interpretation*, *supra* note 65; Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 1 (1988) (discussing the issues raised in *Patterson* and *Runyon*); Maltz, *Legislative Inaction and the Patterson Case*, 87 MICH. L. REV. 858 (1989) (symposium on *Patterson* discussing whether *Runyon* should be overruled or modified).

206. *Patterson*, 491 U.S. at 171.

207. *Id.* at 173.

208. *Id.* at 174-75 (citing Bob Jones Univ. v. United States, 461 U.S. 574 (1983); Brown v. Board of Educ., 347 U.S. 483 (1954); Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("The law regards man as man, and takes no account of his . . . color when his civil rights as guaranteed by the supreme law of the land are involved.")).

209. *Patterson*, 491 U.S. at 171-77.

tion for racial harassment during employment was not cognizable under 42 U.S.C. § 1981.[210] The majority based this conclusion on a literal reading of section 1981.[211] No substantive attention was given to the legislative history surrounding the statute.[212] As in *Caminetti*,[213] the majority looked first at the ordinary meaning of the statute to be construed, and concluded that the phrase "right . . . to make . . . contracts" meant only the creation or formation of a contract.[214] Therefore, the Court determined in turn that the phrase could not apply to postcontract formation situations.[215] The majority went on to define the words "enforce contracts" as embracing the protection of a legal process and the right of access to legal process.[216] To enforce a contract is to have the right to use the legal system to adjudicate one's right to make or enter into a nondiscriminatory contract.[217]

As did the dissent in *Jones*, the *Patterson* dissent adopted the intentionalist approach to statutory interpretation.[218] Justice Brennan, in his dissenting opinion noted: "The legislative history of section 1981 . . . makes clear that we must not take an overly narrow view of what it means to have the 'same right . . . to make and enforce contracts' as white citizens."[219] Justice Brennan enumerated conditions under which African-Americans were employed[220] at the time the Act was passed, and concluded that "such 'acts of persecution' against *employed* freedmen, were one of the 39th Congress' concerns in enacting the [1866] Civil Rights Act . . . ."[221] Justice Brennan asserted

210. *Id.* at 175-81 (a 5-4 decision). The Court stated that "section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts." *Id.* at 176.

211. The majority noted: "By its plain terms, the relevant provision in § 1981 protects two rights: 'the same right . . . to make . . . contracts' and 'the same right . . . to . . . enforce contracts.' " *Id.*

212. Justice Brennan noted in his dissent that the majority arrived at its conclusion "by conducting an ahistorical analysis that ignores the circumstances and legislative history of § 1981." *Id.* at 205.

213. See discussion of *Caminetti*, *supra* notes 116-22 and accompanying text.

214. *Patterson*, 491 U.S. at 176.

215. *Id.* at 175-78.

216. *Id.* at 178. The right to enforce contracts does not, however, extend beyond an employer's conduct that impedes an employee's ability to legally enforce his or her contract rights. *Id.*

217. *Id.*

218. Justice Brennan engaged in a lengthy analysis of the Civil Rights Act of 1866. *See id.* at 189-213 (Brennan, J., dissenting).

219. *Id.* at 206.

220. The use of the whip as an incentive to work harder is an example of such working conditions. *Id.*

221. *Id.* (citation omitted) (emphasis added). Congress wanted to grant the freedmen the same rights as white citizens to make and enforce contracts. *Id.*

that the same legislative history was used to support the holding in *Runyon*,[222] a decision upheld by the Court in *Patterson*.[223]

As in *Runyon*, Justice Stevens took a dynamic approach in interpreting section 1981. In reference to *Runyon*, he stated:

> [I]n the name of logic and coherence, the Court today adds a course of bricks dramatically askew from 'the secure foundation of the courses laid by others,' replacing a sense of rational direction and purpose in the law with an aimless confinement to a narrow construction of what it means to 'make' a contract.[224]

Similar to his opinion in *Johnson*,[225] Justice Stevens argued that the legislative history did not support the Court's interpretation of section 1981.[226] As in *Runyon*, he argued for a dynamic interpretation, an interpretation which "surely accords with the prevailing sense of justice today."[227]

V. Toward a Dynamic Approach to Interpreting Section 1981

The decision in *Patterson* illustrates the confusion that surrounds questions of section 1981's purpose. Advocates of the textual approach in *Patterson* successfully demonstrated that the plain meaning of section 1981 does not encompass postcontract acts of racial discrimination.[228] Similar to Justice Scalia's opinion in *INS v. Cardoza-Fonseca*,[229] the *Patterson* majority concluded that the Court was not at liberty to replace the unambiguous language of section 1981 with unenacted legislative intent.[230]

The majority was at ease with a "plain meaning" interpretation of section 1981.[231] Unfortunately, a disturbing question remains unan-

222. *Id.* Congress wanted to protect the freedmen in the employment context from discriminatory discharge decisions, refusals to contract for their labor, and unfair working conditions. *Id.*

223. *Id.* at 172.

224. *Id.* at 222 (Stevens, J., dissenting).

225. Johnson v. Transportation Agency, 480 U.S. 616 (1987).

226. Justice Stevens appeared to be aware of section 1981's ambiguous history and therefore excluded that history from his analysis in *Patterson*. Furthermore, Justice Stevens apparently believed that the public sentiment toward eradication of racial discrimination, combined with judicial precedents, precluded a literal reading of section 1981. *See Patterson*, 491 U.S. at 221-22.

227. Runyon v. McCrary, 427 U.S. 160, 191 (1976) (Stevens, J., concurring).

228. *See Patterson*, 491 U.S. at 175-81.

229. 480 U.S. 421 (1987).

230. The majority stressed the plain meaning of section 1981, noting that "the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established . . . ." *Patterson*, 491 U.S. at 177. Therefore, it logically follows that the majority considered the literal meaning of section 1981 to be so clear as to bar any analysis of its legislative history.

231. *See supra* note 114.

swered. Like *Holy Trinity Church*,[232] McLean Credit Union may not have violated the literal meaning of section 1981, but did it violate the "spirit" of the statute?[233] The legislative history of the Act must be unearthed to answer this question.[234] The *Patterson* dissent explored the legislative history and discovered that the Reconstruction Congress intended that postcontract racial discrimination be prohibited under the Act.[235] As in *United Steelworkers of America v. Weber*,[236] the *Patterson* dissent asserted that a literal interpretation is too limiting and in contravention of section 1981's legislative history.[237]

The interpretation endorsed in the *Patterson* dissent appears reasonable in light of the legislative history.[238] The *Jones* dissent raises a doubt, however, as to the credibility of the legislative materials preceding the enactment of the Act.[239] Justice Stevens has also noted that recent Supreme Court decisions are no longer wholly supported by section 1981's legislative history.[240] The result is an unstable foundation for constructing a statutory interpretation at variance with the statute's literal meaning.[241] *Patterson* illustrates the need for

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232. Holy Trinity Church v. United States, 143 U.S. 457 (1892).

233. In his dissenting opinion, Justice Stevens answered this question in the affirmative. Criticizing the majority's narrow interpretation of the term "contract," Justice Stevens noted:

> A contract is not just a piece of paper. Just as a single word is the skin of a living thought, so is a contract evidence of a vital, ongoing relationship between human beings. An at-will employee . . . is not merely performing an existing contract; she is constantly remaking that contract. Whenever significant new duties are assigned to the employee . . . the contract is amended and a new contract is made.

Patterson, 491 U.S. at 221.

234. One critic of intentionalism referred to it as an archaeological approach which requires that "a judge [uncover] and [describe] an already fixed past. To be sure, sophisticated archeology is creative and challenging. It must reconstruct a culture from half-buried foundations and some scattered pots. But the archeologist, at least in theory, recreates the past culture as it was without introducing anachronistic artifacts." Aleinikoff, *supra* note 23, at 22 (citation omitted).

235. *Patterson*, 491 U.S. at 205-11 (Brennan, J., dissenting).

236. 443 U.S. 193 (1979).

237. *Patterson*, 491 U.S. at 250-11, 208 n.12. Justice Brennan asserts that under the language of section 1981, harassment is actionable if the harassment demonstrates that the employer imposed discriminatory terms and has not allowed African-Americans to contract on an equal basis. *Id.*

238. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 455-73 (1968) (Harlan, J., dissenting) (discussing Sen. Trumbull's criticism of Sen. Wilson's proposed civil rights bill and the freedmen's bill generally).

239. *See supra* note 189 and accompanying text.

240. *See supra* note 226 and accompanying text.

241. *Jones v. Alfred H. Mayer Co.* illustrated the uncertainty of this foundation. The debates surrounding the enactment of the 1866 Civil Rights Act are so abundant and varied in their themes that an argument for or against the prohibition of private discrimination under the Act could easily be made. *See generally* Jones v. Alfred H.

the judiciary to identify when the various forms of statutory interpretation are applicable.

A. A Case for the Textual Approach

Justice Scalia's opinion in *Cardoza-Fonseca* illustrates a case in favor of the textual approach. As in *Patterson*, the language of the statute at issue was clear and easily interpreted.[242] The INS's interpretation was not, however, at variance with the legislative intent as enumerated by the *Cardoza-Fonseca* majority.[243] Furthermore, the statute in *Cardoza-Fonseca* was specific and consonant with its legislative history.[244] Part II of this article suggests that this is not the case with section 1981. The *Jones* dissent may disagree.[245]

Unlike *Caminetti v. United States*,[246] to construe section 1981 as applying only to contract formation discrimination would not "shock the common understanding"[247] of what it means to make a contract. This might not, however, be the only rational interpretation of section 1981. The legislative history as summarized in Part II of this article demonstrates that the authors of the Act envisioned a statute "much more sweeping" in its application than it is today.[248]

Consequently, the textual approach works best when the statute is clearly and specifically written and consonant with its legislative past.[249] Under these circumstances the test espoused in *Holy Trinity Church v. United States*[250] is met. Specifically, a literal reading of the statute will not produce an absurd or wholly impracticable result.[251]

Mayer Co., 392 U.S. 409 (1968) (holding that section 1982 bars all public and private racial discrimination in the sale or rental of property).

242. INS v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring).

243. *Id.* at 449.

244. *Id.* at 452-53. Justice Scalia asserts that the plain meaning of "well-founded fear" and the Act itself demonstrate that the "well-founded fear" standard and the "clear probability" standard are not equivalent. *Id.*

245. *See generally Jones*, 392 U.S. at 409 (Harlan, J., dissenting). Justice Harlan suggested that the "right" referred to in section 1982 is either a right to equal status under the law and thus operates only against state-sanctioned discrimination, or it is an "absolute" right enforceable against private persons. Justice Harlan chose the first interpretation. *Id.* at 453.

246. 242 U.S. 470 (1917).

247. *Id.* at 486. Here the Court determined that the White Slave Traffic Act applied to all cases in which a woman or girl was transported in interstate commerce for prostitution or any other immoral purpose. See discussion of *Caminetti*, *supra* notes 116-22 and accompanying text.

248. *See supra* note 54 and accompanying text.

249. William N. Eskridge, Jr. proposed a similar model for statutory interpretation, noting that the textual approach works best with recent text which specifically addresses the issue. *Dynamic Statutory Interpretation*, *supra* note 65, at 1497.

250. 143 U.S. 457 (1892).

251. *See id.* at 459.

B. *A Case for the Intentionalist Approach*

As *Holy Trinity Church* illustrates, the intentionalist approach appears useful when a literal reading of a statute creates unreasonable results.[252] Applying the *Holy Trinity Church* test to *Patterson*, however, renders an unclear answer. Although a literal reading of section 1981 may not include postcontract racial discrimination, such a prohibition on employers can be found in the "spirit" of the statute. This point is suggested in Part II of this article. Unlike *Holy Trinity Church*, the legislative history in *Patterson* suggests a broader interpretation of section 1981, rather than the narrow reading afforded the Civil Rights Act of 1866. Similarly, in *Weber*, the Court gave deference to legislative intent where a rule is within the literal language of a statute, but at odds with the intent behind the statute.[253] Consequently, these decisions argue in favor of the intentionalist approach. Specifically, this approach is most effective when the legislative intent is clear and a literal reading of the statute renders an unreasonable result or is subject to more than one meaning.

If the legislative intent is clear, an intentionalist approach will avoid one of the pitfalls created under the public choice theory. Specifically, the legislative history of a statute like the one analyzed in *Cardoza-Fonseca* suggests wide acceptance by Congress, and therefore, eliminates, the risk of compromises which tend to distort the statute's legislative purpose.[254] Like *Cardoza-Fonseca*, clearly expressed legislative intent reduces the likelihood of judicial policymaking because this intent limits the judiciary to interpreting statutes within Congress' clearly established boundaries.

C. *A Case for the Dynamic Approach*

When circumstances similar to those in *Patterson* are not conducive to using a textualist or intentionalist approach, the Court should defer to the "policy of the Nation as formulated by Congress in recent years . . . ."[255] Deference to current societal, political and legal views regarding section 1981 becomes more convincing after considering the alternatives. A literal reading of section 1981 seems at odds with the expansive interpretation afforded other civil rights legislation.[256]

252. *Id.*

253. United Steelworkers of Am. v. Weber, 443 U.S. 193, 201-02 (1979) (prohibition against racial discrimination read in light of legislative history and historical context of Civil Rights Act).

254. *Cf. Dynamic Statutory Interpretation*, *supra* note 65, at 1497-98 (discussing the dynamic approach).

255. Runyon v. McCrary, 427 U.S. 160, 191 (1976) (Stevens, J., concurring) (Because of Congress' consistent efforts to eliminate racial segregation, the Court has sympathetically and liberally construed legislation in this area.).

256. The *Weber* and *Johnson* decisions have given Title VII an expansive role in

Furthermore, an excavation of section 1981's past reveals only bits and pieces of its legislative history—rendering the statute's purpose unclear.[257] Consequently, a dynamic approach emerges as the form of statutory interpretation most applicable to *Patterson*.

The dynamic approach is preferable because it is "more consistent with modern ideas about interpretation and law, and because it concentrates the court's and the parties' attention on the truly relevant factors."[258] One factor to consider is the purpose of section 1981, and whether a modern interpretation of that section would be discordant with the Reconstruction Congress' intent to wipe out racial discrimination. A review of the discussion of the legislative history in Part II of this article indicates that Congress was concerned with more than the formation of employment contracts. Congress was concerned about adverse employment conditions such as corporal punishment and payment of meager wages or no wages. The Act was meant to protect African-Americans from the "tyrannical acts, the tyrannical restrictions, and the tyrannical laws which belong to the condition of slavery . . . ."[259] "These conditions represent nothing more than nineteenth-century racial harassment."[260]

Albeit persuasive, the legislative history of the Act in support of postcontract racial harassment is not conclusive and certainly not in harmony with a literal reading of the statute. The dynamic approach to interpreting section 1981 allows other factors to be brought to bear on the postcontract issue, such as current public policy towards civil rights.

Although difficult to gauge, public policy can be measured through the reaction of elected officials to changes in civil rights leg-

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policing discrimination of minorities in the work place. Johnson v. Transportation Agency, 480 U.S. 616, 645 (1987) (Stevens, J., concurring).

257. *See generally* Aleinikoff, *supra* note 23, at 22-46 (discussing the archaeological and nautical approaches).

258. *Dynamic Statutory Interpretation*, *supra* note 65, at 1539. One factor considered by the *Patterson* dissent was the contractual expectations of Brenda Patterson in light of the legislative history. "The right to make contracts of employment comprises a bundle of rights that includes the rights to deserved promotion, an unhampered work environment, and substantially equivalent treatment as that of one's co-workers. Without these attendant benefits, an individual's right to contract for employment is severely abridged and diluted." *Leading Cases*, *supra* note 8, at 338-39 (citations omitted). Consequently, the dissent argued that "[a] deliberate policy of harassment of black employees" would be interpreted as imposing on them a "contractual term . . . that is not the 'same' as the contractual provisions that are 'enjoyed by white citizens.' " Patterson v. McLean Credit Union, 491 U.S. 164, 221 (1989) (Stevens, J., dissenting). Such actions produce "manifest discrimination in the making of contracts." *Id.*

259. CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866).

260. *Leading Cases*, *supra* note 8, at 338 (citation omitted).

islation[261] and to threatened restrictions of existing law by the judiciary.[262] In an amicus brief to the Supreme Court, several members of Congress acknowledged their support for an expansive interpretation of section 1981, stating:

> Congress' approval of, and its intent to build upon, this Court's interpretation of Section 1981 as reaching discrimination by private parties are unmistakable. The Congress has been fully cognizant of how Section 1981 has been construed by this Court. It has rebuffed legislative efforts to reverse that construction; it has approved and relied on the construction given the statute by this Court; and it has strengthened Section 1981 as a remedy by making attorney's fees available to prevailing parties, thereby encouraging Section 1981's more effective use. Congressional intent could hardly have been more clear if the Congress had reenacted Section 1981 following *Runyon*.[263]

Congress, as the representative of the people, similarly expressed its desire for strong and effective civil rights laws during the congressional debates on the Civil Rights Bill of 1990, which was intended, in part, to overrule the *Patterson* decision.[264] In his address to Congress, Representative Scheuer stated: "Today, we are called upon to restore our civil rights laws to their original intent. . . . Congress now has the opportunity to alleviate the damage done by the Supreme Court's incorrect interpretations of our civil rights laws."[265] Although the 1990 bill was ultimately vetoed, a majority of Congress nevertheless agreed with the Reconstruction Congress' intent to eliminate racial animus in the work place and sought to pass legislation to further that goal.

The statutory interpretation necessary in *Patterson* illustrates a model for the use of the dynamic approach. When a statute like section 1981 is old and its legislative history does not specifically address the current issue, some deference should be given to the "policy of the Nation as formulated by Congress in recent years . . . ."[266] This is especially true here, where Congress has been steadfast in its denunciation of racial harassment.

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261. *Patterson*, 491 U.S. at 174.

262. *Id.* at 203-06.

263. Amicus Brief in Support of Petitioners at 28, Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (No. 87-107) (footnotes omitted).

264. *See* 136 CONG. REC. H9975, H9977 (daily ed. Oct. 17, 1990) (statement of Rep. Edwards); 136 CONG. REC. H6724, H6725 (daily ed. Aug. 1, 1990) (statement of Rep. Mfume).

265. 136 CONG. REC. H9975, H9993 (daily ed. Oct. 17, 1990) (statement of Rep. Scheuer).

266. Runyon v. McCrary, 427 U.S. 160, 191 (1976) (Stevens, J., concurring). *See also supra* note 255.

CONCLUSION

Patterson signals the end of an era marked by an expansive interpretation of section 1981. The Supreme Court has inflicted a major setback for civil rights, a setback worse than any since the 1906 decision in *Hodges*.

Although the *Patterson* majority noted that postcontract formation discrimination is covered under Title VII, they failed to acknowledge the limitations of Title VII. For instance, Title VII does not cover businesses with fewer than fifteen employees. Furthermore, Title VII compensates the injured party only for lost wages.[267] This leaves a gaping hole in civil rights legislation,[268] one which may take considerable time and money to correct through the legislative process.[269]

The use of the dynamic approach to statutory interpretation would have prevented this problem. Civil rights legislation passed in the 1960s clearly indicated Congress' intent to prevent racial discrimination across the board. Furthermore, Congress has sanctioned this policy through legislative inaction subsequent to the *Jones*[270] and *Runyon*[271] decisions. Congress reaffirmed this policy after *Patterson* in its legislative debates concerning the Civil Rights Bill of 1990.[272]

The Court has turned a "blind eye" to congressional policy and public sentiment towards civil rights, steering away from the goal of a discrimination-free society. Consequently, many African-Americans are forced to "suffer silently" in the face of postcontract employment discrimination.[273]

William P. Wassweiler

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267. *See generally Developments in the Law*, *supra* note 166.

268. The Equal Employment Opportunity Commission estimates that 10.7 million employees are not covered by Title VII since they work for employers who hire fewer than 15 employees. Eisenberg & Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 602 n.42 (1988).

269. Congress spent a significant amount of time drafting and debating the Civil Right Bill of 1990. President Bush vetoed this bill in October 1990. *See* 136 CONG. REC. S16,562 (daily ed. Oct. 24, 1990) (President Bush's veto message to the United States Senate). The fallout from the 1989 civil rights cases and the demise of the 1990 Civil Rights Bill are already apparent. Rep. Edwards noted that "hundreds of lawsuits have already been dismissed because of [the 1989 Supreme Court civil rights decisions]. Countless other [lawsuits] have not even been filed since the Supreme Court made it virtually impossible to successfully bring an employment discrimination case." 136 CONG. REC. H9975, H9977 (daily ed. Oct. 17, 1990) (statement of Rep. Edwards).

270. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

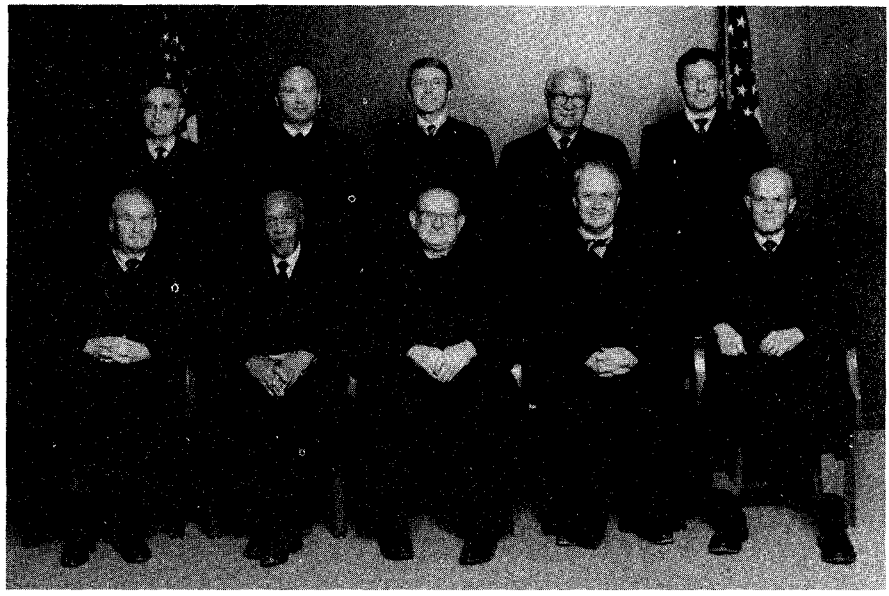
271. Runyon v. McCrary, 427 U.S. 160 (1976).

272. *See supra* note 264.

273. Legal Times, Aug. 7, 1989, at S12.

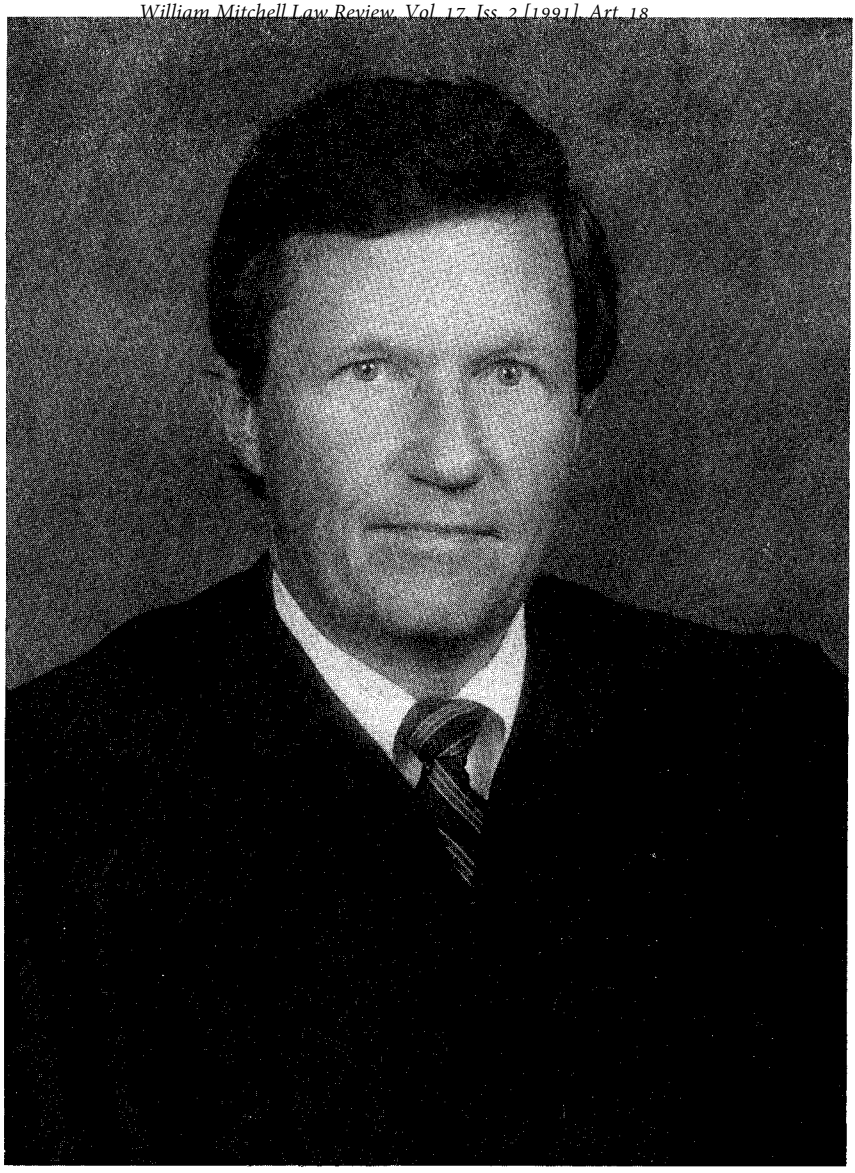
Eighth Circuit Issue

The Court of Appeals for the Eighth Circuit



Top Row (left to right): Judge C. Arlen Beam, Judge Roger L. Wollman, Judge Pasco M. Bowman, Judge Frank J. Magill, and Judge James B. Loken.

Bottom Row: Judge John R. Gibson, Judge Theodore McMillian, Chief Judge Donald P. Lay, Judge Richard S. Arnold, and Judge George G. Fagg.



THE HONORABLE JAMES B. LOKEN
Judge, United States Court of Appeals for the Eighth Circuit